RECEIVED

DOCKET FILE COPY ORIGINAL

SEP 19 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

94-108

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332	)	PR File No. 94-SP6
of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

OPPOSITION

NYNEX Mobile Communications
Company

Edward R. Wholl
120 Bloomingdale Road
White Plains, NY 10605
(914) 644-5525

Its Attorney

September 19, 1994

Table of Contents

SUMMARY i

I. INTRODUCTION AND SUMMARY OF POSITION 1

II. THE NYPSC HAS FAILED TO MEET ITS STATUTORY BURDEN 3

III. CONTINUED STATE REGULATION OF CELLULAR RATES WOULD IMPEDE THE DEVELOPMENT OF A COMPETITIVE MARKET 14

IV. CONCLUSION 16

SUMMARY

The New York Public Service Commission ("NYPSC") has petitioned the Commission, under the provisions of the Omnibus Budget Reconciliation Act of 1993, to extend its regulation over the rates for intrastate cellular radio service. To succeed in its request, the NYPSC must demonstrate either (1) that market conditions with respect to the provision of cellular services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (2) that such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state. The NYPSC has failed to submit evidence sufficient to meet the required statutory basis for the continuation of the NYPSC's regulation of rates for cellular service. In fact, actual experience demonstrates that the competitive nature and unique market characteristics of cellular service provide customers with market-based protection against unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory. The NYPSC's petition should be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	PR File No. 94-SP6
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

OPPOSITION

NYNEX Mobile Communications Company ("NYNEX"), by its attorney, hereby opposes the Petition to Extend Rate Regulation ("petition"), dated August 5, 1994, filed by the New York State Public Service Commission ("NYPSC").[1]

I. INTRODUCTION AND SUMMARY OF POSITION

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act") amends the Communications Act of 1934 to preempt state and local rate and entry regulation of all commercial mobile radio services, effective August 10, 1994.[2] The Budget Act, however, permits any state that regulated rates for commercial mobile radio services ("CMRS") as of June 1, 1993 to petition the Commission to extend that authority based on a showing that

---

1 NYNEX, through it operating cellular subsidiary or partnerships in which it holds a managing interest, operates cellular systems in a number of cellular markets throughout the State of New York.

2 Budget Act, §6002(c)(2)(A); 47 U.S.C. §332(c)(3)(A-B).

(1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state."[3] States seeking to file such petitions were required to do so by August 10, 1994.[4]

Of the 18 states which regulated or partially regulated the rates for cellular service as of January 1, 1994, 8 petitions were filed by states seeking to retain their authority over intrastate mobile service rates.[5] This opposition addresses only the petition filed by the NYPSC. As to that petition, the NYPSC has failed to submit evidence sufficient to meet the required statutory basis for the continuation of the NYPSC's regulation of rates for commercial mobile radio service. In fact, actual experience demonstrates that the competitive nature and unique market characteristics of cellular service provide customers with market-based protection against unjust or unreasonable rates or

---

[3] 47 U.S.C. §332(c)(3)(A)-(B).

[4] 47 U.S.C. §332(c)(3)(B).

[5] Public Notice, DA 94-876, released August 12, 1994.

rates that are unjustly or unreasonably discriminatory. Accordingly, the petition should be promptly denied.

II. THE NYPSC HAS FAILED TO MEET ITS STATUTORY BURDEN

In its Second Report and Order in Docket No. 93-252[6], the Commission correctly concluded that "Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all commercial mobile radio service to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest."[7] In light of this Congressional intent, the Commission made it clear that any state seeking to extend its rate regulation "must submit evidence to justify their showing" and would have the burden of proof of establishing that the showing has met the statutory basis for the continuation of state regulation.[8] Finally, in addition to the evidence submitted with its petition, the state must identify and provide a detailed description of the existing or proposed rules that it would establish if the Commission were to grant its petition.[9]

---

6 ___ FCC Rcd ___ (1994); 74 Rad. Reg. (P&F) 835 (1994).

7 Second Report and Order at ¶250.

8 Second Report and Order at ¶251.

9 Second Report and Order at ¶252.

The NYPSC's petition relies principally on the contention that the New York Public Service Law imposes upon the NYPSC a non-discretionary statutory duty to regulate the rates of cellular telephone companies and resellers of cellular telephone service. According to the NYPSC, this statutory obligation establishes, as a matter of law, that market conditions with respect to CMRS "fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly discriminatory."[10] This contention is without merit.

The NYPSC's contention assumes that, in enacting the Budget Act, Congress intended to permit states to continue their regulation of the rates for CMRS simply upon a showing that they were required to do so under state law. If that had been Congress' intent, Section 332(c)(3)(A) would have provided that any state that regulated rates for CMRS as of June 1, 1993, would be permitted to continue its regulation of the rates for CMRS upon the filing of a petition certifying that state law required the state to continue such rate regulation. Congress, of course, did not intend such a result.

In enacting the Budget Act, Congress was aware that CMRS providers had been subject to inconsistent federal and state

[10] Petition, p. 2. The NYPSC does not allege that cellular service is a replacement for land line telephone exchange service.

regulation. Congress found that the public interest required that similar services be accorded similar regulatory treatment. To accomplish this purpose, Congress adopted Section 332(c)(3)(A) with the intent to preempt states from continuing their rate regulation of CMRS unless they could demonstrate, by factual evidence, that market conditions are such that consumers are not protected from unreasonable rates.

The NYPSC's attempt to meet its evidentiary burden under the Budget Act and the Commission's Rules falls far short of what would be required to sustain its burden of proof.[11] The NYPSC asserts that continued rate regulation is required because the market is inadequate to control each cellular provider's actions.[12] According to the NYPSC, the cellular market does not

---

[11] In addition, the petition does not include a detailed description of the existing or proposed rules that the NYPSC would establish if the petition were granted.

[12] The NYPSC's assertion is in sharp contrast to conclusions it reached on the competitiveness of the cellular industry just five years ago. In its Opinion and Order Concerning Regulatory Response To Competition, Opinion No. 89-12 issued and effective May 16, 1989, in Case 29469, the Commission stated that: "[w]e conclude that the service is furnished competitively, for the market structure is one that has been designed by the FCC to be competitive. Additionally, the existence of resellers--compounded by the existence of significant excess capacity--operates to check monopoly abuses of the facilities-based carriers and reduce the potential for a duopoly. Our experience which shows that these carriers do not need to be regulated . . . also supports our conclusion that this market is competitive" (Opinion,

(footnote continued on next page)

exhibit the trait of "effective competition" which, it asserts, "requires strong mutual pressure on firms to perform well (by minimizing costs, by providing good service quality and by innovating rapidly) in order to survive."[13] The NYPSC's characterization of the cellular market is wrong and is contrary to actual industry experience.

The rigorous competition that exists between the two cellular providers that are licensed (and who provide service) in each of the cellular markets located in the State of New York is evidenced by the efforts of those companies to minimize their costs, provide excellent service, and offer their customers with the services they demand.

In NYNEX's situation, competitive pressure to expand its coverage area and to improve call quality has required it to invest hundreds of millions of dollars in a network infrastructure that includes almost 600 cell sites. In addition, NYNEX has been at the forefront of technical and marketing

---

(footnote continued)

p. 9). So strongly did the NYPSC feel about the competitiveness of the market that it announced that it would "seek legislation that suspends the application of most aspects of the Public Service Law, including certification and rate regulation, to the provision of cellular service" (Opinion, pp. 9-10). A copy of the NYPSC's decision is attached hereto.

[13] Petition, p. 3.

innovations to ensure that its systems are providing customers with the types and quality of services that they demand. As customers in our urban markets evidenced an increasing demand for portable phones over car phones, NYNEX re-directed its network infrastructure efforts to accommodate that demand. NYNEX deployed some of the country's first microcellular technology inside buildings, train stations and tunnels to provide customers with an expanded opportunity to place cellular calls. Our participation in the development of new wireless data offerings has been stimulated by customer demand and competitive market pressure.[14] These same market pressures are stimulating the development of an advanced intelligent network cellular platform that will provide customers with new and sophisticated service offerings at lower costs.

The NYPSC states that it received 146 complaints (only 66 of which were rate related) during the twelve month period ending May 31, 1994. These complaints, asserts the NYPSC, <u>may</u> indicate that market forces may not be adequate to protect consumers from unreasonable or discriminatory rates.[15] This assertion is absurd.

---

[14] For example, NYNEX developed and introduced a cellular data service which permits customers in the package delivery business to track and transmit their package delivery performance on a real-time basis using our cellular network.

[15] Petition, pp. 9-10.

In New York, we estimate that cellular licensees and resellers provide service to approximately one million customers. The small number of customer complaints filed against cellular providers demonstrates the responsiveness of cellular carriers to the needs of their customers. NYNEX's own experience reflects its commitment to customer satisfaction. In 1993, 1 of every 6,600 NYNEX customers -- only .015% of NYNEX's customers -- complained to the NYPSC. This complaint rate demonstrate that NYNEX's customers are highly satisfied with respect to the quality of the service they are receiving as well as the rates that they are paying for the service.

Our customer growth rates confirm that customers are highly satisfied with the prices and service offered by NYNEX. In 1989, NYNEX, in all of its cellular markets, served 213,000 customers. By 1992, that number had increased to 391,000. In 1993, as a result of a substantial investment in our network infrastructure and increased marketing and sales initiatives, NYNEX added 183,000 new customers -- a 47 percent increase from the previous year. NYNEX has continued to add customers at almost double the 1993 rate during 1994, adding 160,000 customers in the first six months of the year. NYNEX could not have achieved this significant growth if the rates for its service were unreasonable or if its service quality were inadequate.

The market characteristics of the cellular and wireless industry will ensure that customers are protected against unreasonable rates or inadequate service. The cost to a cellular provider of acquiring a customer is substantial. In addition to the cost of expanding its network to accommodate expected demand, cellular providers typically spend $300-600 to attract each new customer to their service.[16] If a cellular provider fails to satisfy the ongoing needs of those customers through high quality service and reasonable rates, the customers will leave and obtain their service elsewhere. Cellular customers are highly sophisticated and knowledgeable and will move from carrier to carrier if they perceive that they will receive lower rates or improved service by doing so. The introduction of personal communications service and enhanced specialized mobile radio service will provide additional choices and market protection for consumers.[17]

---

[16] This expenditure includes the expense associated with sales agent commissions, promotional offerings and product subsidies.

[17] The NYPSC suggests that cellular service is becoming more of a necessity and consumers may not easily decide to forego cellular service if they are dissatisfied with rate or discriminatory practices (Petition, p. 12). While cellular service increases business productivity and enhances an individual's sense of safety it is not a necessity and it has not been regulated like one. As a result, customers can, and do, terminate their service when they perceive that the rates for the service exceed the expected value of the service.

The NYPSC asserts further that continued rate regulation is required because "the rates for cellular service remain considerably higher than comparable land line telephone services."[18] The fact that rates for cellular and land line local service are different is hardly surprising in light of the different service and cost structures that exist between cellular carriers and local exchange companies, the greater market risks in providing cellular service and the different regulatory objectives underlying the regulation of these services.[19]

The fact of the matter is that market forces in New York have led to substantial reductions in the real price for cellular service. The NYPSC concedes as much.[20] A customer, for example,

---

[18] Petition, p. 8.

[19] The NYPSC also notes that in 1993 the returns on common equity for cellular companies providing service in New York range from a high of 79% to a low of 0% which suggests "that there is the potential for rates to become unjust or unreasonable, absent continued regulatory oversight" (Petition, pp. 8-9). The Commission recognizes, however, that these returns are not indicative of the competitiveness of the market (Petition, p. 9). In addition, the trend indicated by the NYPSC's own data indicates that rates of return of cellular carriers have declined over time. As additional CMRS providers enter the market, these returns can be expected to decline even further. Moreover, these returns do not indicate that the rates for cellular service are unreasonably high. In light of the NYPSC's decision to regulate cellular providers on a streamlined basis, the NYPSC has never undertaken to prescribe rates of return for cellular carriers. In any event, these NYPSC's speculative concerns provide no basis for continued rate regulation.

[20] Petition, p. 4 ("cellular rate levels do appear to be declining").

of NYNEX's New York cellular system using 30 minutes of airtime per month would have paid $44.30 for the service (including the monthly access charge) in 1984. A customer would pay $39.99 for the same service today. This represents a 38.75% decrease in rates when adjusted for inflation.

In addition to these reductions in local airtime rates, the real cost of cellular service has been reduced in other ways as carriers have sought to improve the value of cellular service to their customers. For instance, in 1987, NYNEX eliminated its monthly $3.00 charge for each of its call forwarding, call waiting and three party calling features. Since that time, these features have been included as part of the customer's basic service.[21] In addition, NYNEX has eliminated charging for incomplete calls, extended the off-peak discount period and substantially increased discounts for volume purchases and annual commitments.

There have also been substantial reductions in the rates charged for roamer service. NYNEX recently eliminated the $3.00 daily surcharge rate, at the retail levels across most of its markets, and reduced roamer airtime rates.[22] NYNEX also recently

---

[21] Follow-Me-Roaming™ service is also included as part of a customer's basic service.

[22] NYNEX's introduction of Mobile Reach Service makes it much easier for NYNEX customers to be reached when they travel throughout the Northeast.

introduced lower and simplified retail pricing under which its customers pay a flat per-minute charge (plus applicable landline charges) for cellular calls placed while roaming throughout North America.[23]

The NYPSC's petition also ignores the efforts undertaken by NYNEX to develop innovative retail rate plans to meet the changing needs of its customers. In 1984, NYNEX offered three rate plans to its New York customers. Today, customers can choose from among seventeen rate plans that are tailored to allow customers to budget the cost of cellular service based on their individual needs. The Simplicity Plan, for example, was introduced to provide customers with the maximum discount available as their usage varied over time. In response to customer requests for a pricing plan that included allowances for minutes in the monthly access charge, NYNEX recently introduced Minute Value Plans that offer customers a choice of attractively packaged usage plans (i.e., 30 minutes, 60 minutes, and 180 minutes of usage included in the monthly access charge). NYNEX

---

[23] Under its plan, NYNEX's customers roaming anywhere within New York or New England outside of their home rate territory pay $.59 per minute for cellular calls, $.79 per minute for calls while roaming outside the NYNEX system from Southern New Jersey to Washington, D.C., and $.99 per minute while roaming anywhere else in the United States, Canada, Mexico and the Virgin Islands, regardless of the roaming surcharges and airtime rates which NYNEX pays the underlying cellular carrier or carriers.

also introduced a Safety Advantage Plan in response to customers' needs for a low cost cellular service primarily designed to meet safety and security needs. The GO Plan provides for a sharply discounted rate applicable to service limited to a restricted geographic are. The GO Plan allows customers who do not travel over large areas to enjoy substantial savings while obtaining the benefits of cellular service.[24]

The NYPSC contends that continued rate regulation is necessary to permit the New York Commission to ensure that roamers will have the ability to access emergency services while roaming in another carrier's service territory.[25] The NYPSC is wrong.

NYNEX believes, as does the NYPSC, that roamers should have access to emergency services while traveling in our cellular systems. Accordingly, NYNEX has entered into hundreds of agreements with other cellular carriers -- both wireline and non-wireline -- which ensures that roamers have access to their emergency services. In any event, a continuation of the NYPSC's

---

24 The robust competition between cellular providers to attract and retain customers has also stimulated extensive promotional efforts by cellular providers. Promotions undertaken by NYNEX have included a waiver of activation charges, the provision of free minutes, and sharply discounted or free cellular phones.

25 Petition, p. 11.

rate authority is not necessary to ensure that other cellular carriers enter into similar agreements. If interconnection disputes do occur between cellular carriers which impact upon a customer's ability to roam, the NYPSC can address such issues, on a case-by-case basis, under its continuing authority to regulate the terms and conditions under which cellular service is provided.

III. CONTINUED STATE REGULATION OF CELLULAR RATES WOULD IMPEDE THE DEVELOPMENT OF A COMPETITIVE MARKET

The NYPSC contends that "continued rate regulation of cellular carriers will not place unwarranted regulatory burdens on cellular carriers nor will it act as an impediment to wireless infrastructure investment."[26] This contention is contrary to Congress' and the Commission's own findings.

The NYPSC claims that rate regulation is not an impediment to effective competition. We disagree. Data submitted in Docket 93-252 demonstrates that prices are 10%-15% higher in markets where rates are regulated. This data confirms that competition, rather than rate regulation, better results in reduced rates for consumers.

It is also clear that continued rate regulation would inhibit the development of a fully competitive market for

---

26 Petition, p. 11.

wireless services. Today, customers may obtain wireless broadband, digital voice, data and video, cellular, paging, dispatch, SMR, and mobile data from a wide range of providers. Customers will soon be able to receive such personal communications services as wireless PBX services, microcellular service, campus services, customized data transmission offerings, and other specialized services that meet their needs. The rate regulation of these services would impede the competitive development of these services.

If the NYPSC were allowed to extend its rate regulation of cellular service, competitors would continue to receive notice through regulatory filings of price changes, new services, or other offerings before such offerings were even made available to the public. The disclosure of rate information inhibits competition.[27] Customers do not read tariffs, competitors do. Carriers are less likely to be innovative and are more likely to "watch and follow" when they are able to monitor their competitor's strategies through tariff filings. Tariffs become a mechanism for competitors to track and match innovative offerings and reduce the incentive of cellular providers to anticipate and

---

[27] This would be particularly true if, as may be the case, the NYPSC does not undertake to regulate the rates of other commercial mobile service providers, such as Nextel, who provide customers with functionally equivalent services.

determine what it takes to satisfy customers and to develop their own innovative offerings.

The continuation of rate regulation also serves, as the NYPSC has recognized in the past, to increase the cost of providing service. In a competitive marketplace, carriers should be permitted to use their resources to develop their infrastructure and to attract and serve customers rather than to comply with unnecessary regulation.

IV. CONCLUSION

The Budget Act contemplates that states will be preempted from the rate regulation of CMRS except in those instances where a state can demonstrate that market forces are inadequate to protect the interests of consumers. States seeking such authority must provide hard evidence, not theory or speculation, to support their petition. The NYPSC has failed to demonstrate that the continued rate regulation of cellular service in New York is necessary to protect consumers from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory.

WHEREFORE, for the reasons set forth herein, the Petition to Extend Rate Regulation filed by the New York Public Service Commission should be denied.

Respectfully submitted,

NYNEX Mobile Communications
Company

By: Edward R. Wholl
Edward R. Wholl

120 Bloomingdale Road
White Plains, N.Y 10605
(914) 644-5525
Its Attorney

Dated: September 19, 1994

Certificate of Service

I hereby certify that a copy of the foregoing Opposition was served by first class United States Mail, postage prepaid, on the parties listed below, this 19th day of September, 1994:

William J. Cowan, Esq.
General Counsel
Public Service Commission
State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Mildred Schuman

Mildred Schuman

ATTACHMENT

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 89-12

CASE 29469 - Proceeding on Motion of the Commission to Review Regulatory Policies for Segments of the Telecommunications Industry Subject to Competition.

OPINION AND ORDER CONCERNING
REGULATORY RESPONSE TO COMPETITION

Issued and Effective: May 16, 1989

CASE 29469

TABLE OF CONTENTS

	Page
APPEARANCES	
PROCEDURAL BACKGROUND	1
INTRODUCTION	3
CELLULAR TELEPHONE SERVICE	8
RESELLERS	11
INTER-LATA SERVICES	16
Other Common Carriers	16
ATTCOM	18
INTRA-LATA SERVICES	21
Introduction	21
Dedicated Switching	22
Private Line, Collocation, and Interconnection	24
Switched Carrier Access Services	30
Local Exchange Company Carrier Access Issues	30
Intra-LATA Toll	31
PUBLIC TELEPHONE SERVICE	32
BILLING AND COLLECTION SERVICES	34
OTHER MATTERS	36
Moratorium Impact	36
Procedural Objections	36
CONCLUSION	37
ORDER	37
APPENDICES	
CONCURRENCES	

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

APPEARANCES

Saul M. Abrams, Esq.
William Bouteiller, Esq.
for Department of Public Service Staff
Three Empire State Plaza
Albany, New York 12223

Thomas M. Eichenberger, Esq.
Katherine P. White, Esq.
Elaine McHale, Esq.
for AT&T Communications of New York, Inc.
32 Avenue of the Americas
New York, New York 10013

Sam Laniado, Esq.
Read & Laniado
for New York State Telephone Association, Inc.
25 Eagle Street
Albany, New York 12207

Howard Read, Esq.
Read & Laniado
for Cellular Telephone Co., Syracuse Telephone Co., and Utica Cellular Co.
25 Eagle Street
Albany, New York 12207

Lesley Douglass Webster, Deputy Commissioner and Counsel (by Anne F. Curtin, Esq.)
for New York State Department of Economic Development
One Commerce Plaza
Albany, New York 12245

David R. Poe, Esq.
H. Liza Moses, Esq.
LeBoeuf, Lamb, Leiby & MacRae
for ALLTEL New York, Inc.
520 Madison Avenue
New York, New York 10022

Frank J. Miller, Esq.
Huber, Lawrence & Abell
for Continental Telephone Co. of New York, Inc.
99 Park Avenue
New York, New York 10016

B.P. Oliverio, Esq.
Kavinoky & Cook
for Albany Telephone Co., Buffalo Telephone Co., and Genesee Telephone Co.
120 Delaware Avenue
Buffalo, New York 14202

Edward R. Wholl, Esq.
Alan Stein, Esq.
for NYNEX Mobile Communications Co.
One Blue Hill Plaza
Pearl River, New York 10965

Robert C. Atkinson
R.P. Romanelli
for Teleport Communications
One World Trade Center, Suite 2649
New York, New York 10048

William E. Erickson, Esq.
S. Elizabeth Daigle, Esq.
for MCI Telecommunications Corp.
Five International Drive
Rye Brook, New York 10573

David A. Gross, Esq.
Sutherland, Asbill & Brannan
for New York Clearing House Association
1666 K Street, N.W.
Washington, D.C. 20006

Henry D. Levine, Esq.
Brant S. Karstetter, Esq.
Morrison & Foerster
for New York Clearing House Association, Committee of Corporate Telecommunications Users, and MCI Telecommunications Corp.
2000 Pennsylvania Avenue, N.W., Suite 5500
Washington, D.C. 20006

Michael T. Tomaino, Esq.
Nixon, Hargrave, Devans & Doyle
for Rochester Telephone Corporation
Lincoln First Tower
Rochester, New York 14603